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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE, PETITIONER

v.

JOHN FOSTER DULLES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 85–88) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 67–73) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956. The petition for a writ of certiorari was filed on September 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 103 of Public Law 188, 82d Congress, conferred upon the Secretary of State, in his absolute discretion and notwithstanding the provisions of any other law, the authority to terminate the employment of any officer of the Foreign Service. The question is whether, in the exercise of this statutory authority, petitioner was validly removed by the Secretary of State from the Foreign Service of the United States.

STATUTES AND REGULATIONS INVOLVED

Section 103 of Public Law 188, 82d Congress (The Department of State Appropriation Act, 1952, 65 Stat. 575, 581) and Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1) are set forth in the Appendix, *infra,* pp. 16–18. The regulations of the Department of State in effect at the time of petitioner's dismissal (adopted May 4, 1951, revised September 21, 1951) are set forth in the Appendix, *infra,* pp. 19–41.

STATEMENT

On March 24, 1950, the Chairman of the Loyalty Security Board of the Department of State, acting under Executive Order 9835, 12 Fed. Reg. 1935, notified petitioner that a hearing had been scheduled to consider charges against him,[1] with a view to making

[1] The charges against petitioner were that (R. 28–30):

"* * * within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of or in sympathetic association with the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States

a recommendation to the Secretary of State as to whether or not his employment should be terminated in the interest of the United States, pursuant to Section 104 of Public Law 179, 81st Congress[2] (R. 28–30).

Following extensive hearings attended by petitioner and his counsel, the State Department Loyalty Security Board, on October 6, 1950, concluded that reasonable grounds did not exist for believing that petitioner was disloyal to the United States and that, notwithstanding a single serious indiscretion in the handling of classified information, petitioner did not constitute a security risk to the Department of State (R. 28). This conclusion was approved by the Deputy Under Secretary of State (R. 42–43, 63).

After the issuance of Executive Order 10241, 16 Fed. Reg. 3690, on April 28, 1951, amending Executive Order 9835, the Loyalty Security Board of the Department of State again considered petitioner's case under the new loyalty standard set out in Executive Order 10241 and determined, on July 31, 1951, that no reasonable doubt existed as to his loyalty to

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by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority."

[2] Section 104, Public Law 179, authorized the Secretary of State, notwithstanding the provisions of any other law, in his "absolute discretion", to terminate the employment of any Foreign Service officer "whenever he shall deem such termination necessary or advisable in the interests of the United States."

the United States (R. 28). This decision was also approved by the Deputy Under Secretary of State (R. 42–43, 63). The Department of State referred this decision to the Loyalty Review Board of the Civil Service Commission for "post-audit" review.

On October 11, 1951, the Loyalty Review Board of the Civil Service Commission advised petitioner that, after review of the file, that Board had determined that the public interest required that it hold a new hearing which would be based upon the charges previously issued to petitioner by the Department of State Loyalty Security Board (R. 78–79). A hearing was held before a panel of the Loyalty Review Board attended by petitioner and his counsel at which petitioner and other witnesses testified.

Subsequent to this hearing, petitioner's attorney and the Chairman of the Loyalty Review Board entered into a stipulation to the effect that evidence had been taken at the hearing before the Loyalty Review Board on the issue as to whether petitioner had disclosed information of a confidential or non-public character within the meaning of subparagraph d of paragraph 2a of Part V, "Standards", of Executive Order 9835, as amended; that since the letter of charges given petitioner had not stated specifications as to the intentional or unauthorized disclosure by petitioner of information of a confidential or non-public character, in order to avoid returning the case to the Department of State for an amendment of the letter of charges, it was agreed that the Loyalty Review Board might make a determination as if the original

letter of charges had contained the following charge (R. 30-32):

> Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

On December 12, 1951, the Loyalty Review Board rendered its opinion (R. 1–12) that there was reasonable doubt as to petitioner's loyalty based on his intentional and unauthorized disclosure to Philip Jaffe, the editor of Amerasia magazine, of documents and information of a confidential and non-public character (R. 1–12).

On December 13, the Deputy Under Secretary of State informed petitioner that the Secretary of State had been advised of the decision of the Loyalty Review Board and that he had directed the termination of petitioner's employment in the Foreign Service "under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress * * *" (R. 75–76).

Secretary Acheson, in making the determination to dismiss petitioner, acted in the exercise of his authority under both Executive Order 9835, as amended, and under Section 103 of Public Law 188. Although he made his determination solely as a result of his review of the opinion of the Loyalty Review Board—without independent review of the evidence or of the

Board's findings—he did not consider that he was legally bound or required by the opinion of the Loyalty Review Board to discharge petitioner. On the contrary, he considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to him and that he was legally free to exercise his own judgment as to whether petitioner's employment should be terminated, and he did exercise his own judgment (R. 81–83). The formal notice of termination issued to petitioner, dated December 17, 1951, cited as the authority for his termination Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress (R. 83–85).

Petitioner applied to the Civil Service Commission for relief and was informed by the Chairman of the Commission (R. 38–39) that the decision of the Loyalty Review Board was in the nature of a recommendation; that the Secretary of State had terminated petitioner's services pursuant to Executive Order 9835, as amended, and Section 103 of Public Law 188; and that the Civil Service Commission had no power to review the action of the Secretary of State, noting that the dismissal of petitioner was within the exclusive province of the Secretary of State (R. 38).

Petitioner then commenced this action in the District Court (R. 39–61) seeking, *inter alia*, a judgment declaring his discharge void and invalid; to obtain reinstatement to his employment with salary from the date of his discharge to the date of reinstatement; and for the expunging from the record of statements reflecting that his dismissal was on the ground that there was or is reasonable doubt as to his loyalty to

the United States (R. 59–61). On cross-motions for summary judgment, the District Court declared the action of the Loyalty Review Board to be a nullity and directed the Civil Service Commission to expunge from its records the Loyalty Review Board's finding that there is reasonable doubt as to petitioner's loyalty to the United States (R. 86, 90). The court then granted the respondents' motion for summary judgment, sustaining petitioner's dismissal from employment solely on the basis of Section 103 of Public Law 188, 82d Congress (R. 86–88, 90). On petitioner's appeal from this judgment, the Court of Appeals unanimously held that petitioner was validly discharged under Section 103 of Public Law 188, 82d Congress (Pet. App. 67–73) and affirmed the judgment of the District Court.

ARGUMENT

In accordance with this Court's decision and opinion in *Peters* v. *Hobby*, 349 U. S. 331, the District Court declared that the action of the Loyalty Review Board of the Civil Service Commission was a nullity (R. 85) and ordered the Civil Service Commission to "expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to [petitioner's] loyalty to the United States" (R. 90). Petitioner's removal from the Foreign Service thus comes to rest solely upon the independent authority of Section 103 of Public Law 188, 82d Congress (App., *infra*, p. 16) which provides that:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555),

> or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

A removal from federal employment under this authority, as noted by the Court of Appeals (Pet. App. 73, n. 4), "carries no implication that [petitioner] might be either disloyal or a security risk."

Stripped, as it is, of all overtones of loyalty or security, petitioner's case is, in substance, identical to that of *Scher* v. *Weeks*, 231 F. 2d 494, (C. A. D. C.), certiorari denied, June 4, 1956, 351 U. S. 973. For reasons similar to those pertinent to the *Scher* case (No. 901, Oct. Term, 1955), the present petition should be denied.[3]

1. (*a*). At the time petitioner's employment was terminated, December 13, 1951, the procedural rights applicable to dismissals from government employment were conferred, generally, by three statutes: Section 6 of the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 652), Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1), and Section 14 of the Veterans' Preference Act (Act of June 27, 1944, 58 Stat. 390, as amended, 5 U. S. C.

[3] Public Law 188, 82d Congress, expired by its own terms in 1952. Though a provision identical to § 103 of Public Law 188 appeared as § 103 of Public Law 495, 82d Congress (66 Stat. 555), the provision was discontinued, without subsequent reenactment, with the State Department Appropriation Act of 1954.

863).[4] But Section 103 of Public Law 188, 82d Congress, under which petitioner was removed, expressly withdrew from employees the rights conferred by these statutes as well as the rights otherwise available to petitioner under the Foreign Service Act of 1946 (60 Stat. 1016, 22 U. S. C. 1007, 1008). In clear and unambiguous terms, Section 103 empowered the Secretary of State, during the then current fiscal year, to remove employees "[n]otwithstanding the provisions of [the Lloyd-LaFollette Act] or the provisions of any other law * * *." Emphasizing the breadth of this grant of authority, Section 103 further provided that the Secretary could exercise the power of dismissal "in his absolute discretion."

Petitioner challenges the validity of the Secretary's determination to dismiss him under this "absolute discretion" statute because he says the Secretary based his action entirely on the "illegal action" of the Loyalty Review Board (Pet. 14) in undertaking to review a favorable decision of the departmental Loyalty Security Board. Members of the Loyalty Review Board were men of outstanding ability, competence and integrity, and the Secretary undoubtedly had respect for their opinion. Inasmuch as the Secretary had absolute discretion to remove petitioner for any reason he saw fit, he certainly could have asked the members of the Board, in their private capacity, or any other person or group of persons in whom he had confidence, for their opinion and on the basis of that opinion he could have decided either to remove

[4] See also, Part II, Executive Order 9835 (Pet. App. 28-29).

petitioner or not to remove him. The fact that petitioner's removal, had it been effected solely under Executive Order 9835, would have been invalid has no effect whatsoever upon the separate and independent ground, under the "absolute discretion" statute, upon which the Secretary also acted.

Thus, the single limitation imposed by Section 103—and the sole procedural "right" which petitioner may claim—was that the Secretary "deem such termination necessary or advisable in the interests of the United States." And it is clear from the Secretary's affidavit (R. 81–83), as both courts below agreed (R. 87, Pet. App. 71–72), that this determination was made by the Secretary of State in petitioner's case. Since the sole procedural requisite to a discharge under Section 103 has been met, petitioner's discharge is valid and, being procedurally regular, is not subject to further review. *Scker* v. *Weeks,* 231 F. 2d 494 (C. A. D. C.), certiorari denied, 351 U. S. 973; *Williams* v. *Cravens,* 210 F. 2d 874 (C. A. D. C.), certiorari denied, 348 U. S. 819; *Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290.

(*b*). Contradicting the "absolute discretion" with which the Secretary of State was vested by Section 103 of Public Law 188, petitioner contends that he could have been validly removed from the Foreign Service only upon compliance with State Department Regulations and Procedures (App. *infra,* pp. 19 *ff*) which are, in terms, applicable to loyalty and security

cases.[5] Without conceding that there was any deviation from the applicable regulatory procedures (see *infra*, pp. 13–14), we submit that petitioner's argument is without merit because it is based upon the incorrect assumption that petitioner, admittedly discharged under the authority of Public Law 188, was, in fact, discharged under that authority as a loyalty and security risk (Pet. 17).

From the outset, petitioner was fully informed that the Secretary of State was considering his case under two independent sources of authority: Executive Order 9835 (the loyalty order) and the "absolute discretion" statute (R. 28–30). And every *official* statement with respect to petitioner's termination denotes that the determination to remove him from the Foreign Service and the termination itself were made under both sources of authority (R. 38, 75–76, 81–85). Section 103, neither by its terms nor by implication, restricted the Secretary's summary removal authority to loyalty or security cases. Had the Secretary regarded petitioner's removal as necessary in the interest of national security, the appropriate authority for his removal would, of course, have been Section 1 of the Act of August 26, 1950 (5 U. S. C. 22–1, App. *infra*, pp. 16–18). Moreover, the Secre-

[5] The Regulations and Procedures of the State Department (App. *infra*, pp. 19*ff*.) were promulgated to conform to the procedural requirements of Executive Order 9835 (12 Fed. Reg. 1935), as amended by Executive Order 10241 (16 Fed. Reg. 3690)—which governed loyalty cases—and to conform to the procedural requirements specified in Section 1 of the Act of August 26, 1950 (5 U. S. C. 22–1) (App. *infra*, pp. 16–18), providing for the suspension and termination of employment "when deemed necessary in the interest of national security."

tary's affidavit does not state that, in exercising his summary removal authority under the "absolute discretion" statute, he dismissed petitioner either as disloyal or as a security risk (R. 81–83). And, as the Court of Appeals noted under a like statute in *Scher* v. *Weeks, supra,* and as it reiterated in this case, petitioner's removal under Section 103 of Public Law 188 "carries no implication that he might be either disloyal or a security risk" (Pet. App. 73).

Thus, as matters stand, petitioner's removal rests solely upon the Secretary's determination that, in his judgment, petitioner's removal was, in the words of the statute, "in the interests of the United States"—free of any implication of disloyalty or security. Accordingly, as the courts below have held, the procedural requirements of Executive Order 9835 and the Act of August 26, 1950, and the State Department Regulations pursuant thereto, had no application to petitioner's removal. And as petitioner himself recognizes (Pet. 18), the "absolute discretion" statute imposed no procedural requirements whatever for his dismissal (Pet. 18). "'Under Public Law 188 petitioner could have been summarily dismissed without notice of charges, hearing, or appeal'" (Pet. App. 72). See also *Scher* v. *Weeks,* 231 F. 2d 494 (C. A. D. C.), certiorari denied, 351 U. S. 973.

Petitioner attempts to bring his case within the rule of *Accardi* v. *Shaughnessy,* 347 U. S. 260, that where a department head prescribes by regulation a course of procedure not required by statute, he may not disregard that procedure in a particular case.

But as noted above (*supra*, pp. 10–11), the State Department Regulations and Procedures relied upon (App. *infra*, pp. 19*ff*.) are, in terms, applicable to dismissals on loyalty or security grounds, not to a dismissal in the exercise of authority under the "absolute discretion" statute.

2. Moreover, the procedures prescribed by the State Department Loyalty and Security Regulations were followed in petitioner's case, not because the procedures were applicable to the exercise of the Secretary's "absolute discretion" under Section 103, but because the regulatory procedure was applicable to the exercise of his authority under Executive Order 9835, under which he was concurrently proceeding in petitioner's case (R. 28–30, 75–76, 81–85). There was no departure from the Loyalty and Security Regulations in effect at the time of petitioner's dismissal.[6] The provision quoted by petitioner (Pet. 18), that the Secretary of State would, in the exercise of his "ab-

[6] Petitioner's contention to the contrary is based upon the Department of State's 1949 Regulations, which had been amended in May and September 1951, prior to petitioner's dismissal.

The Department of State Loyalty and Security Regulations were not published in the Federal Register because the statute establishing the Federal Register contemplates that regulations such as these dealing only with procedures applicable to Government employees shall not be published in the Register. Section 6 of the Act of July 26, 1935, 49 Stat. 500, 501, 44 U. S. C. 305. Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, excepts from the publication requirement any matter relating solely to the internal management of an agency. The 1951 regulations of the Department of State were distributed by the Department in accordance with normal distribution procedures, and copies were available to such employees as were affected or requested them.

solute discretion" authority, afford employees the same protection as provided under the Loyalty Program, was not in effect when petitioner was dismissed (Sec. 391.3, App. *infra*, p. 20). Likewise, the provision (Pet. 20) indicating that a favorable decision by the Department of State Loyalty Security Board would be reviewed only by an Assistant Secretary of State was modified, prior to petitioner's dismissal, to provide that such determination should be subject to post-audit by the Loyalty Review Board of the Civil Service Commission (Sec. 395.6, App. *infra*, pp. 37–38).

Finally, the provision of the regulations for appeal to the Secretary of State was, in both the 1949 and 1951 versions of the Regulations, for an appeal from an adverse decision by the Department of State Loyalty Security Board, not from an adverse decision by the Loyalty Review Board (Secs. 395.1, 396.1, Pet. App. pp. 41, 44; App. *infra*, pp. 32, 38). Since petitioner received favorable rulings from the Loyalty Security Board, there was, of course, no occasion for him to appeal those rulings to the Secretary of State.

3. The question presented, moreover, is no longer of general applicability. The statute under which petitioner was discharged, Section 103 of Public Law 188, 82d Congress, expired by its own terms in 1952. Though, as previously noted (*supra*, p. 8, n. 3), a provision identical to Section 103 of Public Law 188 appeared as Section 103 of Public Law 495, 82d Congress (66 Stat. 555), it expired in 1953, and the provision was discontinued, without subsequent re-enactment, with the State Department Appropriation Act of

1954. No case involving a like or similar statutory provision is currently pending in the lower courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1956.

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APPENDIX

Section 103 of Public Law 188 (the State Department Appropriation Act, 1952, 65 Stat. 575, 581), provides as follows:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1), provides as follows:

> Notwithstanding the provisions of section 652 of this title, or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the

Army, Department of the Navy; Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided,* That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further,* That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of sections 22–1 to 22–3 of this title, shall be given after his suspension and before his employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this

purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further,* That any person whose employment is so suspended or terminated under the authority of said sections may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of said sections may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

The Regulations and Procedures of the Department of State, adopted May 4, 1951, revised September 21, 1951, provide as follows:

390 LOYALTY AND SECURITY OF EMPLOYEES

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in

accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers

and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Present membership in any of the organizations designated by the

Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of government of the United States by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standard and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any

foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently belives in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed nec-

essary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian, Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is received shall be referred for consideration to the Loyalty Security Board which shall take action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional information required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be re-

quested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sections 394.13 through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writing of the proposed removal action which shall state the nature of the charges against him in factual detail, setting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and/or section 14 of the Veterans' Preference Act of 1944; and for proposed removal on grounds relating to security shall be

Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the board shall furnish the officer or employee a notice of the time and place when the board proposes to consider his case, in order that he, together with his counsel or representative, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board

cannot require him to appear, and no inference or presumption should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer or employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you should take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days

subsequent to his receipt of the notice of charges, except as provided in section 22.2 (a) (2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in accordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in sections 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyalty Security Board to show why he

should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31 The hearings shall be before a panel of the Loyalty Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyalty Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will *not* include all material in the file of the case, in that it will *not* include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the in-

terrogatory, if any, and the evidence taken at the hearing.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witnesses as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyalty Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be my majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been

handicapped in his defense by the non-disclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds *exist* for belief that the officer's or employee's

removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

e. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyalty Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board

Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall *not* be a part of the written decision and shall in *no* instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty grounds after a determination unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Government. In such exceptional circumstances the board may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

395.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Secu-

rity Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Security Board requires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government, but that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secre-

QUESTION PRESENTED

Section 103 of Public Law 188, 82d Congress, conferred upon the Secretary of State, in his absolute discretion and notwithstanding the provisions of any other law, the authority to terminate the employment of any officer of the Foreign Service. The question is whether, in the exercise of this statutory authority, petitioner was validly removed by the Secretary of State from the Foreign Service of the United States.

STATUTES AND REGULATIONS INVOLVED

Section 103 of Public Law 188, 82d Congress (The Department of State Appropriation Act, 1952, 65 Stat. 575, 581), is set forth in the Appendix, *infra*, p. 43. The Regulations and Procedures of the Department of State, adopted May 4, 1951, revised September 21, 1951, are set forth in the Appendix, *infra*, pp. 43–66.

STATEMENT

Petitioner's employment as a Foreign Service Officer in the Foreign Service of the United States was terminated by the Secretary of State effective as of the close of business on December 14, 1951 (R. 75–76). His removal was effected under the authority of Section 103 of Public Law 188, 82d Congress (commonly known as the "McCarran Rider") and under Executive Order 9835, as amended by Executive Order 10241 (R. 82). The Loyalty Review Board of the Civil Service Commission had previously found that there was a reasonable doubt as to his loyalty to the Government of the United States (R. 35). The administrative action leading to petitioner's separation, and the judicial proceedings below, are as follows.

1. PETITIONER'S SEPARATION FROM GOVERNMENT EMPLOYMENT

On March 24, 1950, the Chairman of the Loyalty Security Board, Department of State, notified petitioner, an officer in the Foreign Service of the United States, that a hearing had been scheduled to consider charges against him with a view to making a recommendation to the Secretary of State as to whether or not petitioner's employment should be terminated in the interest of the United States (R. 28–30). The specific charges against petitioner, detailed in the letter of March 24, 1950, were as follows (R. 29):

> The specific charges are that within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1,a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority.

The letter made reference to Section 104, Public Law 179, 81st Congress (The Department of State Appropriation Act, 1950, 63 Stat. 456), which, like

tary and/or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable ground *do not exist* for belief that the officer's or employee's

removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds *exist* for belief that the officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice

its successor, Section 103 of Public Law 188 (The State Department Appropriation Act, 1952, App. *infra* p. 43), gave to the Secretary of State the authority, in his absolute discretion, to terminate the employment of any Foreign Service officer of the United States whenever the Secretary "shall deem such termination necessary or advisable in the interests of the United States." The letter also referred to the procedures prescribed for administering the loyalty program under Executive Order 9835 (12 F. R. 1935) and petitioner was advised that it was his privilege to reply to the charges in writing and that a hearing would be held by the Loyalty Security Board on April 20, 1950, at which petitioner might appear and present evidence in his own behalf through witness or affidavit.

Following hearings attended by petitioner and his counsel, the Loyalty Security Board of the State Department, on October 6, 1950, concluded that reasonable grounds did not exist for believing that petitioner was disloyal to the United States. The Board took note of the fact that petitioner had committed two serious acts of indiscretion in that he had communicated classified information to Philip Jaffe, editor of the magazine *Amerasia*, without checking Jaffe's reputation and had allowed Jaffe to take possession of classified documents in violation of regulations (R. 24–25). Notwithstanding these "indiscretions", the Board concluded that petitioner did not constitute a security risk to the Department of State (R. 28). The findings and conclusions of the Loyalty Security

shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *exist* for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *do not exist* for belief that the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

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